IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 683 of 1998

in

SPECIAL CIVIL APPLICATIONNo 2479 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA and
MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?
1,2 & 4 Yes : 3 and 5 No

HINDUSTAN DOOR OLIVER LTD

Versus

VADODARA MUNICIPAL CORPORATION

Appearance:
Mr.M.J.Thakore, senior counsel with
MR RD DAVE for Appellant
Mr.S.N.Shelat, senior counsel with
MR JA ADESHRA for Respondent No. 1
Mr.P.G.Desai for the respondent No.2

CORAM : MR.JUSTICE M.R.CALLA and
MR.JUSTICE J.R.VORA

Date of Order: 20/06/98

ORAL JUDGMENT {Per: M.R. Calla, J.}

1. This Letters Patent Appeal is directed against the judgment and order dated 15.5.98 passed by the learned single Judge in Special Civil Application No.2479 of 1998 whereby the learned single Judge has dismissed the Special Civil Application and the Rule has been discharged.

2. The facts of the present case show that in July 1997, the Vadodara Municipal Corporation had issued a notice inviting tender for the repairing work of mechanical parts of the Sewage Treatment Plants at Atladra/Gajarawadi and to put the said plants into operational condition. In response to this notice inviting tender, the tenders were invited in two parts; one is Price Bid and another one is Technical Bid. On 26.9.97, the tenders for technical bid were opened and after considering the changes in the technical requirements and after making known the final requirements to the parties, the price bids were again required to be revised. The parties which remained in the race were the present appellant - original petitioner and the respondent No.2. Old as well as new bids were opened on 9.12.97. There is no dispute about the factual position that, on 9.12.1997 for both the plants i.e. Atladra and Gajarawadi, the rates quoted by the respondent No.2 were the lowest. Although the rates quoted by the respondent No.2 were found to be lowest as on 9.12.97, the respondent Municipal Corporation entered into further negotiations with both the parties. The appellant was called on 16.1.98 and on this date, the revised rates were quoted by the appellant for the Atladra Plant at Rs.1,91,07,398/- and for Gajarawadi Plant at Rs.2.04,43,254/-. It further appears from the record that the respondent No.2 was also called for negotiations on 23.1.98 and on the said date, the respondent No.2 offered a rebate of 2.5% in the rates for each of the two plants and simultaneously had also offered a rebate of 5% for Atladara Plant and 6% for Gajarawadi Plant, in case the respondent No.2 is given the work of both the Plants. The Municipal Commissioner of Vadodara Municipal Corporation recommended on 17.3.98 that in view of the rates quoted by the appellant on 16.1.98 for the plant at Atladara, which was lower in comparison to the rates quoted by the respondent No.2 even after taking note of the rebate of 2.5%, the work for the Atladara Plant may be given to the appellant and in view of the rates quoted by the respondent No.2 for

the Plant at Gajarawadi being lower after taking note of the 2.5% rebate in comparison to the rates quoted by the appellant, the work of the Plant at Gajarawadi may be given to the respondent No.2. However, the Standing Committee of the Municipal Corporation considered all the aspects of the matter including the fact that the respondent No.2 had also offered 5% discount for Atladara Plant and 6% discount for Gajarawadi Plant in case the job for both the plants is given to it, and on that basis the rates quoted by the respondent No.2 for Atladara and Gajarawadi put combined were lower as compared to those quoted by the appellant for each of the two plants, and decided on 16.3.1998 to give the work order for both the Plants to the respondent No.2 and accordingly the work order was issued in favour of the respondent No.2 by the Vadodara Municipal Corporation on 27.3.1998. By awarding both the jobs to the respondent No.2, the Corporation found that it will save a sum of Rs.3,63,793/-.

3. Aggrieved from this decision of the Vadodara Municipal Corporation, the appellant preferred Special Civil Application, as aforesaid before this Court. The learned Single Judge after considering the case of both the sides, has ultimately dismissed the Special Civil Application and aggrieved from this decision of the learned Single Judge rendered on 15.5.98, the present Letters Patent Appeal was filed during vacation on 27.5.98. The matter came up before the learned Vacation Judge on 29.5.98 and in the Civil Application No.4700 of 1998, which was filed along with this Letters Patent Appeal, the respondent No.2 entered appearance as Caveator and the notice was issued to the respondent No.1 by the learned Vacation Judge and the same was made returnable by 18.6.1998 and thereupon the matter came up before us.

4. The main argument, which has been urged on behalf of the appellant before us, is that while taking the decision to give the job of both the Plants to the respondent No.2, the Vadodara Municipal Corporation has not acted fairly inasmuch as the appellant and the respondent No.2 were not called for negotiations simultaneously and on the same date. It has been argued that the appellant was called on 16.1.98 and the respondent No.2 was called later on, and therefore, whatever rates were quoted by the appellant on 16.1.98 could have become known to the respondent No.2 so as to revise his rates as lower in comparison to the appellant. It has also been submitted that as on 16.1.98, the rates quoted by the appellant were lower and if at all the respondent No.2 had made the further offer of 5% and 6%

discount on a date later than 16.1.98, the same should have been made known to the appellant and the negotiations should have been held in presence of both the parties on the same date. The learned counsel for the appellant has argued that this course of action adopted by the respondent - Corporation has given an edge to the respondent No.2 for offering further 5% and 6% rebate in case the job is given for both the Plants and otherwise the appellant's rates were lower in respect of each of the two plants separately.

5. The appellant has also submitted that he was prevented by the Municipal authorities from making the offers with reference to both the jobs. On this aspect of the matter, the appellant and the Municipal Corporation are at dispute and the allegation of the appellant had been denied in the return and the affidavit filed by the Municipal Corporation and we do not find it necessary to go into this disputed question of fact. However, there is no dispute about the factual position as under:

(a) On 9.12.97 the rates quoted by the appellant were as under:

For Atladra Plant - Rs.2,58,24,380/-
For Gajarawadi Plant - Rs.2,24,14,790/-

(b) On 9.12.97 the rates quoted by the respondent No.2 were as under:

For Atladara Plant - Rs.1,99,50,000/-
For Gajarawadi Plant - Rs.2,12,89,500/-

Thus the rates of the respondent No.2 for each of the two Plants were lower in comparison to that of the appellant.

On 16.1.98, the rates quoted by the appellant were as under:

For Atladara Plant - Rs.1,91,07,398/-
For Gajarawadi Plant - Rs.2,04,43,254/-

As on this date i.e. 16.1.98, while the opportunity to make the final offer was yet to be given to the respondent No.2 and the same had been given to the appellant, the rates of the respondent No.2 for each of the two plants remained the same as they were on 9.12.97 and, therefore, the rates of the appellant in respect of each of the two plants were lower.

After the opportunity was given to the respondent No.2 for further negotiations subsequent to the date of 16.1.98 i.e., 23.1.98 when the respondent No.2 had offered 2.5% rebate with regard to each of the 2 Plants separately, i.e., with reference to 23.1.98, the rates quoted by the appellant remained as under as the same were on 16.1.98:

For Atladara Plant - Rs.1,91.07,398/-
For Gajarawadi Plant - Rs.2,04,43,254/-

But in view of the 2.5% rebate quoted by the respondent No.2, the rates of the respondent No.2 came out as under as on 23.1.98:

For Atladara Plant - Rs.1,94,51,250/
For Gajarawadi Plant - Rs.2,02,25,025/-

Thus taking the rates separately for each of the Plant even as on 23.1.98, the rates of the appellant were lower only in respect of Atladara Plant, but in respect of Gajarawadi Plant, the rates of the respondent No.2 were lower. However, on the basis of the further rebate offered by the respondent No.2 on 23.1.98 itself in case the job of both the plants is given to it with the offer of 5% rebate for Atladara Plant and 6% for Gajarawadi Plant, the final rates of the appellant and the respondent No.2 figured as under:-

The rates of the appellant
for Atladara - Rs.1,91,07,398/-

The rates of the respondent No.2
for Atladara - Rs.1,89,52,500/-

The rates of the appellant for
Gajarawadi Plant - Rs.2,04,43,254/-

The rates of the respondent No.2
for Gajarawadi Plant - Rs.2,00,12,130/-

Thus, in case of both the jobs being given to the respondent No.2,the rates of respondent No.2 were lower in comparison to that of the appellant and the Municipal Corporation has assessed the saving at Rs.3,67,793/- in case both the jobs are given to the respondent No.2.

6. The learned Single Judge has examined the grievances of the parties on the aforesaid undisputed factual position and the learned Single Judge has also

taken note of the stand of the respondent No.1 that both the parties i.e. the appellant as well as the respondent No.2 were equally competent. The learned Single Judge has held that the procedure followed by the respondent Corporation in not calling upon the parties to submit their final bids on the same day was not the best possible procedure but has declined to interfere by saying that merely because the best possible procedure has not been followed, the Courts should not interfere with the decision of the authority.

7. The learned counsel for the respondent Corporation and the respondent No.2 have argued that it is an established fact that as on 9.12.97, the respondent No.2's rates were lower and, therefore, without anything more the respondent - Corporation could have given the job to the respondent No.2 on that date itself. However, in such matters the procedure of entering into further negotiations is not alien and, therefore, further negotiations were held. The case of the respondent Corporation is that each of the two parties i.e. appellant as well as respondent No.2 had been given one more opportunity to give the revised final price bid and merely because one party was called on 16.1.98 and the other party was called later on i.e. on 23.1.98, it cannot be said that the procedure followed by the Municipal Corporation has caused any prejudice to the appellant and this procedure does not suffer from any impropriety and it cannot be said that the procedure has been unfair to the appellant. The learned counsel for the respondent - Corporation has argued that it was open for the appellant while giving final offer on 16.1.98 to offer any rebate, but no such rebate was offered. But the rebate was offered by the respondent No.2 for each of the two Plants separately and further rebate was also offered if the job is given for both the Plants. Taking into consideration the saving of the sum of Rs.3,67,793/-, it decided to give the work order for both the Plants to the respondent No.2 and the Standing Committee of the Municipal Corporation had unanimously taken the decision to this effect. It has also been submitted by the respondent - Corporation that the recommendations, which were made by the Municipal Commissioner on 17.3.98, were obviously oblivious of the rebate, which had been offered by the respondent No.2. In any case, the fact remains that ultimately in the final price bid the rates of the respondent No.2 were the lowest and whereas both the parties were equally competent, the respondent Corporation had not erred in giving the work order to the respondent No.2 and has not been unfair to the appellant, there has been no

impropriety.

8. The learned counsel for the appellant has cited the case of Dutta Associate Pvt.ltd. v. Indo Merchantiles Pvt. Ltd., reported in (1997) 1 SCC 53. In this decision, the Apex Court has laid down that the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open and any abuse of power for extraneous reasons would expose the authorities concerned to appropriate penalties at the hands of the Court. Stress was laid by the learned counsel for the appellant on the last 4 lines in the end of para 4 of the judgment where the notice has been taken that denial of opportunity to make counter-offer is a vitiating factor. In the facts of the present case, one opportunity was given to each of the parties i.e. the appellant as well as the respondent No.2 through negotiations held on 16.1.98 and 23.1.98 respectively. Had the opportunity not been given to the respondent No.2 for negotiation, it could certainly be a vitiating factor. In the facts of the case at hand, when the negotiations were held with the appellant on 16.1.1998 although the rates of the respondent No.2 were lower as on 9.12.1997, the respondent Corporation could not have dispensed with the further negotiations with the respondent No.2 after negotiations had been held with the appellant on 16.1.98. In this view of the matter, we do not find that any vitiating factor had crept in, in the decision-making process by the respondent Corporation. The learned counsel for the appellant has placed reliance on the case of Ram and Shyam Company v. State of Haryana, reported in AIR 1985 SC 1147. In the facts of the case before the Supreme Court the appellant's bid was rejected on the ground that it did not represent adequate market consideration for the concession to extract minor mineral. The Supreme Court found that a unilateral offer, secretly made, not correlated to any reserved price made by respondent after making false statement in the letter was accepted without giving any opportunity to the appellant either to raise the bid or to point out the falsity of the allegations made by respondent in the letter as also the inadequacy of his bid. The Supreme Court found that the appellant had suffered an unfair treatment by the State in discharging its administrative functions and, therefore, the fundamental principle of fair play in action had been violated and the appellant, who was the highest bidder, could not be expected to raise his own bid in the absence of a competitor.

Reliance was also placed on the case of Jaiprakash Industries Ltd. v. Sardar Sarovar Narmada

Nigam Ltd, reported in 1992(1) GLH (N.O.C.)1. In this case this Court has held that the scope of Article 14 has been widened and it does bring within its scope not only unlawful discrimination but even unfair treatment and arbitrariness. The Court has observed that when any change is to be made in the tender price by removing conditions or otherwise that cannot be permitted and if at all it was to be permitted the respondent should have acted fairly.

In Sterling Computers Ltd. v. M/s. M & N Publications Ltd., reported in AIR 1996 SC 51 the question was with regard to the grant of Government contract without inviting tenders and in para 20 of this judgment it has been observed that once the procedure adopted by an authority for the purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution of India, the Courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by Court amounts to encroachment on the exclusive right of the executive to take such decision.

In the case of Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd., reported in (1997) 1 SCC 738 while referring to the case of Tata Cellular v. Union of India (1994) 6 SCC 651, it has been observed as under:

"The duty of the Court is to confine itself to the question of legality. Its concern should be:

Whether a decision making authority

1. exceeded its powers,

2. committed an error of law,

3. committed a breach of rule of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The

extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety."

Having quoted the aforesaid decision, the Supreme Court has observed at the end of para 10 as under:

"The technical capability of any of the three bidders to undertake the works is not in question. Two of the bids are very similar in price. If additional commercial information which has now been provided by bidders through Pradip Port Trust, had been available at the time of assessment, the outcome would appear to favour the award to AFCONS."

This judgment has been relied upon by the learned single Judge in the judgment, but the learned counsel for the appellant has submitted that it does not support the case of the respondents inasmuch as the Supreme Court has considered that had the additional commercial information provided by the bidders been available at the time of assessment, the outcome would appear to favour the award to AFCONS. In our opinion such is not the fact situation obtaining in the present case with which we are dealing. When the negotiations were held with the appellant, the respondent No.2 was not present and when the negotiations were held with the respondent No.2 the appellant was not present and, therefore, nothing turns out in favour of the appellant on the basis of the observations, as aforesaid.

9. As against this strong reliance has been placed by the learned counsel for the respondent No.2 on the case of Tata Cellular v. Union of India, reported in AIR 1996 SC 11. In this case after discussing catena of decisions the Supreme Court has laid down following principles in para 113 of the judgment and the same are

quoted as under:

"(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decisions. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiation through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides."

10. We have considered the submissions made on behalf of the parties. In view of the undisputed facts to which a reference has been made in the earlier part of this order, it is clear that on 9.12.97 as well as when the final price list was considered by the Corporation, the rates quoted by the respondent No.2 were lower. There cannot be any quarrel with any of the propositions of law laid down in the judgments as aforesaid. We agree with the view taken by the learned single Judge that merely because the best possible procedure has not been followed and the appellant and the respondent No.2 were called on different dates, the decision taken by the authorities cannot be said to be the result of an unfair procedure to offend Article 14 of the Constitution of India. As a question of fact, it appears that the appellant's

apprehension that the rates quoted by him on 16.1.98 would have become known to the respondent No.2 appears to be unfounded. No doubt, in such cases the prejudice may operate in a subtle manner in a given case, but in the facts of the present cases, it is clear that even on 23.1.98 when the respondent No.2 quoted its rate, in respect of Atladara plant it was higher in comparison to that of the appellant and had the rate quoted by the appellant been leaked out to the respondent No.2 and had he known the rates quoted by the appellant, the respondent No.2 would not have quoted higher rate than that of the appellant in respect of the plant at Atladara. It is also found that the respondent No.2 took further caution of quoting an alternative rate at a further rebate of 5% in case both the jobs are given to him. It does not appeal to the reason that even after knowing the rates quoted by the appellant on 16.1.1998 the respondent No.2 would have yet quoted higher rate in respect of Atladara plant and would have made alternative offer offering further rebates of 5% and 6%. Therefore, as a matter of fact, we find that no prejudice can be said to have been caused to the appellant and the apprehension on which the whole argument has been raised by the appellant does not find any factual foundation. When both the parties were equally competent and the rates quoted by the respondent No.2 were lower initially on 9.12.97 and even ultimately when the final price list was considered and in such a situation if the work order had been given to the respondent No.2 for reasons of substantial saving for the Corporation, it cannot be said that the exercise of such power warranted any interference in writ jurisdiction of this Court and we also find that the learned single Judge has rightly observed while dealing with the objections raised on behalf of the appellant that "imprudence does not necessarily mean arbitrariness."

11. We do not find any substance in the present appeal. There is no reason to take a view different than what has been taken by the learned single Judge. Accordingly, this Letters Patent Appeal is hereby dismissed. The interim order granted by the learned single Judge in favour of the appellant while passing the impugned order stands vacated. No order as to costs.

The learned Counsel for the appellant prayed that the interim relief, which has been granted by the learned Single Judge, be extended. The request is opposed by the learned Counsel appearing on behalf of the respondent Corporation as well as the respondent No.2. The learned Counsel for the Municipal Corporation has stated that it

is a question of repair of the sewage plant of the Municipality and in want of the repair work being carried out, the general public is suffering. It is adding to the pollution and the Municipality has to answer in Division Bench of this Court with regard to the completion of the Project and that it will be against the interest of the general public if the sewage plants are not repaired and made operative. The plants are waiting for repairs since July 1997 and on account of the interim orders, it has not been possible to carry out the work although the work order had been issued on 27.3.1998. In the facts and circumstances of this case, we do not feel inclined to continue the interim relief in favour of the appellant.
